IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No. 895 of 2004
With
CRIMINAL MISC.APPLICATION No. 10190 of 2005
In
SPECIAL CRIMINAL APPLICATION No. 895 of 2004
With
SPECIAL CRIMINAL APPLICATION No. 928 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE R.P.DHOLAKIA

HONOURABLE MR.JUSTICE M.D.SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge?

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PRAHALADBHAI PRABHUDAS PATEL & 2 - Applicant(s)
Versus
THE STATE OF GUJARAT - Respondent(s)

Appearance :
MR PM THAKKAR FOR M/S THAKKAR ASSOC. for petitioners in Spl.Cri.Appln.Nos.895 of 2004 and 928 of 2005 and for the respondents in Cri.Misc.Appln.No.10190 of 2005.
MR AD OZA, PP WITH MR RC KODEKAR, APP for the respondent-State in Spl.Cri.Appln.Nos.895 of 2004 and 928 of 2005 and for the petitioner-State in Cri.Misc.Appln.No.10190 of 2005

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CORAM : HONOURABLE MR.JUSTICE R.P.DHOLAKIA

and

HONOURABLE MR.JUSTICE MD SHAH

Date : 09/03/2006

COMMON C.A.V. JUDGMENT

(Per : HONOURABLE MR.JUSTICE R.P.DHOLAKIA)

1. Special Criminal Application No.895 of 2004 has been filed by the petitioners against the order dated 4-8-2004 passed by the learned Special Judge (POTA) below Ex.123 in Special POTA Case No.3 of 2004 and No.5 of 2004 holding the communication sent by the State Government accepting the directions of the State Review Committee qua dropping of Secs.3(3), 20(1) and 21(1) of the POTA against accused Nos.3 and 4 of POTA Case No.3 of 2004 and accused No.1 of POTA Case No.5 of 2004 as not binding to the said Court.

2. Special Criminal Application No.928 of 2005 has been filed by the petitioners against the opinion dated 21-5-2005 given by the Central POTA Review Committee headed by

Justice (retd.) S.C.Jain to the effect that prima facie case is made out for proceeding against all the accused under the provisions of POTA.

3. It may be stated that an interim relief was granted by the learned Single Judge (Coram C.K.Buch,J.) of this Court in Special Criminal Application No.895 of 2004 vide order dated 10-9-2004. It is directed by the learned Single Judge in unnumbered sub-paragraph 3 as under:

> “In the meanwhile, there shall be stay of further proceedings of Case No.3/2003 and 5/2004 pending before the Hon'ble Designated POTA Court, Ahmedabad qua the present petitioners.”

4. Thereafter, Cri.Misc.Application No.10190 of 2005 in Special Criminal Application No.895 of 2004 has been filed by the State praying for vacating the interim relief granted vide order dated 10-9-2004. When this application was placed before another learned Single Judge of this Court (Coram: K.A.Puj,J.), it

was observed vide order dated 13-9-2005 as under:

> “The present application is filed for vacating the interim relief granted by this Court (Coram: Hon'ble Justice C.K.Buch) vide order dated 10.09.2004. However, the subject matter of the Special Criminal Application No.895 of 204 is under POTA and hence, the present application should be placed before the appropriate Court for taking up POTA matters. Office is directed to place this matter before the appropriate Court.”

However, no order has been passed qua interim relief which was granted earlier in Special Criminal Application No.895 of 2004.

5. Since this Court is dealing with POTA related matters as per the present roster, a motion was made by learned Public Prosecutor, Mr.A.D.Oza, for hearing of his application for vacation of interim relief granted by learned Single Judge and hence, Cri.Misc.Appln.No.10190 of 2005 has been placed before this Court.

6. During the hearing of the aforesaid application, it was suggested by this Court

that since the main and cognate matters placed in this Court as per the present roster are of the year 2004 pending in the High Court for final disposal, if the learned counsel for the respective parties agree, we may proceed with the final hearing of main matters. Hence, with the consent of the learned counsel appearing for the respective parties, we have proceeded with the final hearing of the main matter together with all connected matters.

7. The facts of the case in brief may be stated hereinafter. A secret information was received by the Commissioner of Police, Ahmedabad, from Central Intelligence Agency about the activity of a person namely, Yasin Ibrahim Noor, settled in Dubai and doing terrorist activity in the State of Gujarat by being a member of 'Lashkar-E-Toiba' and also running the network in India by keeping contact with the agency in Pakistan and,

therefore, said information was handed over to Joint Commissioner of Police, Crime Branch. Therefore, a special team was formed and investigation started in that direction. Meanwhile, Joint Police Commissioner, Crime Branch, Ahmedabad, received an anonymous letter with a cassette giving details of activities of Yasin Noor. On listening the said cassette, since it was found that one person from Dubai namely, Prem was contacting one Raval at Dubai about the bomb blasts which had taken place at Ghatkopar in Mumbai, attention of senior Police Officers was drawn that the person named Prem and that named in the anonymous letter is one and the same and is actively involved in the terrorist activities. According to prosecution, Prem is the alias name of Yasin Noor. On 4-11-2003, through a secret informant, an information was received to the effect that Yasin Noor and his son Kasim Noor of Al-Habib Flat,

Juhapura, Ahmedabad, Gujarat, were keeping illegal arms and ammunition and they are trying to remove them from the said flat. Therefore, the complainant and other police personnel in plain dress accompanied by two independent panchas proceeded towards Al-Habib flat after drawing primary panchnama. When they reached there, they found two persons in the said flat situated on the second floor who introduced themselves as Yasin @ Prem, son of Ibrahim Noor, aged about 58 years and Kasim Noor, son of Yasin @ Prem, aged about 34 years, a permanent resident of Khand-ni-Sheri, Near Jamalpur Pagathiya, Ahmedabad. During their search, cash amounting to Rs.10,417/- was found from Yasin Ibrahim Noor and Rs.225/- from Kasim and they were seized by drawing panchnama. During search in the said flat, they found one gunny bag lying in the loft of the bedroom and on opening the same, one AK 47 rifle, two

magazines and 60 live cartridges were found wherein barrel numbers 56-118065274 and 65274 were mentioned and on inquiry, they stated of having no license to keep the said revolver. They were seized and panchnama to that effect was drawn in presence of panchas.

8. During interrogation of these two persons, it was found that they are the original residents of Ahmedabad. Initially Yasin @ Prem was dealing in export business of sheep and goat in the name and style of Yasin Khamas Meat Trading from Tuna Port, Kachchh, Gujarat to Dubai and was permanently settled in Dubai since 1978 having the address of Sona Bazar area, Alsur Road, Near Kuwaiti Mazjid, Dubai. Yasin came in contact with underworld don Dawood Ibrahim during the period 1985 to 1995 while staying in Dubai. He was closely connected with him and was dealing in smuggling activity of gold and electronic goods. Even after Dawood's leaving

Dubai for Pakistan, Yasin remained in constant touch with him. It was revealed during his interrogation that he was closely connected with other persons involved in terrorist activity in South Asia namely, Mohmad Dosa, Mustifa Majnu, Azajkhan Pathan, Khalil Pahalvan, Iju Shaikh, Abdulla Merchant, Aftab Batki, Haji Sattar Teli, Sharad Shetty, Iqbal Mirchi and Abdul Rashidkhan and Tablik Jamat since 1992. He was also arranging funds for the above activities and was transferring also. He was also closely connected with Iqbal Lala of Himmatnagar, Gujarat, Pasa (Bhatkal, Karnataka) and Aziz @ Azad who are staying in Dubai and are connected with SIMI activities. Apart from the above, he was also closely connected with one Saiyed Akbar of Delhi staying in Dubai and doing terrorist activity in India in the name of Davat-e-Islami. It also came out during the

interrogation that since he got the information that lives and properties of Muslims staying in Gujarat riots after Godhra carnage were lost, he came in contact with a person named Sufi Chacha, an ISI agent and a resident of Pakistan having a jewellery shop in the name of Sufi Jewellers in Sona Bazar, Dera, Dubai, and started Jehadi activity in India. In this regard, said Sufi Chacha managed to introduce the main person namely, Mohmed Azar @ Raval @ Rahim @ Bapu at present residing at Dubai and an ISI agent and also the person managing the network of 'Lashkar-E-Toiba' in India and for that, Sufi Chacha involved Yasin Noor in the above referred activities with him as a joint coordinator with an understanding to arrange finance, weapons and give training to youths while Yasin Noor would use his Indian (Gujarat) contacts of local people for doing the terrorist activities in Gujarat, India. With

the aforesaid intention in mind, Yasin Noor through his son Kasim Noor staying in Ahmedabad, Gujarat, asked to send names and telephone numbers of Muslim youths interested in involving themselves in terrorist activity and Kasim Noor in turn sent those details. Yasin Noor thereafter talked over phone and also encouraged those youths in their above referred activities. Names of above referred persons were also mentioned in the FIR. Thereafter they also arranged the contact of various people all over India willing to involve themselves in this type of activity. It was further revealed that for doing this Jehadi activity, Yasim Noor illegally sent lakhs of rupees through hawala from Dubai to Mumbai and from Mumbai to Ahmedabad through an agency known as Abdul Latif Money Exchange, a firm situated at Dubai and owned by one Sattar Bapu, originally a resident of Veraval, Gujarat and also through one

Thanmal Marvadi Kaka and Patel Online Services through Kirtibhai Joshi, Prahladbhai Patel and their owners. It was also revealed that same has been utilized for the above referred activities in the State of Gujarat. Not only that, money was sent to other Jehadis actively involved in other places of India namely, Karnataka, Mumbai (Maharashtra), Khanpur (U.P.), Surat(Gujarat), Bas Bareli (U.P.), etc. Further, from the flat of main terrorist of Ghatkopar blast, who lost his life in an encounter with the police, police recovered cash of Rs.20.00 lakhs. He came from Dubai to Ahmedabad to survey the things and after survey, it was decided to do some fydain attacks in Gujarat in busy places. In view of the aforesaid, a complaint to that effect was registered against two persons at initial stage being DCB Crime, Ahmedabad City I.C.R.No.11 of 2003 for the alleged

commission of offences punishable under Secs. 120-B, 121, 121(c) and 122 of Indian Penal Code; Secs.3(3), 20(c), 21(1) and 22 of the POTA Act and also under Secs.25(1)(A)(a) and 29 of the Arms Act.

9. As the provisions of POTA were invoked on the accused, they preferred separate applications before the State POTA Review Committee, Ahmedabad, for withdrawal of said charges. All those applications were heard together and the State POTA Review Committee on affording opportunity of hearing to the parties concerned, by a majority opinion, directed that it found no prima facie case to proceed against the present petitioners under Secs.3(3), 20(1) and 21(1) of the POTA and which statutorily stand withdrawn as provided for under Sec.60(7) of the POTA and trial may be proceeded with against them only under Sec.22(2)(5) of the Act.

10. Being aggrieved by the aforesaid order of the

State Review Committee, the State preferred application below Ex.123 in POTA Case Nos.3 of 2004 and 5 of 2004 before the Special Court (POTA) at Ahmedabad. The learned Special Judge (POTA) vide order dated 4-8-2004 observed that the communication sent by the State Government accepting the directions of the State Review Committee qua dropping of Secs.3(3), 20(1) and 21(1) of the POTA against accused Nos.3 and 4 of POTA Case No.3 of 2004 and accused No.1 of POTA Case No.5 of 2004 is not binding to the said Court and the Court would take cognizance of the matter on the date of framing of charges i.e. on 11-8-2004. It is this order which is under challenge by the original accused Nos.3,4 and 7 way of Special Criminal Application No.895 of 2004.

11. It may be stated that as per the POTA repealed Act, the Central POTA Review Committee amongst others also heard the case

of the present petitioners. The Central Review Committee vide its opinion dated 21-5-2005 held that prima facie case is made out against all the accused including the present petitioners for proceeding under the provisions of POTA. It was also held that it is the prerogative of the trial court which is vested with the powers under Secs.227 and 228 of the Code of Criminal Procedure to see which of the section or sections of POTA are to be invoked against individual accused. It is this opinion dated 21-5-2005 of the Central Review Committee which is under challenged by way of preferring Special Criminal Application No.928 of 2005.

12. It may be noted that along with these petitions, three appeals being Criminal Appeal Nos.1156 of 2004, 1157 of 2004 and 1158 of 2004 filed by the petitioners against the order passed by the learned Special POTA Court in the applications for discharge under

Sec.227 of the Cr.P.C. were also heard together. However, those appeals are jointly decided by a separate judgment keeping in mind the questions involved. As the questions involved in these matters are common, they are being decided by this common judgment and order.

13. We have heard Mr.P.M.Thakkar, learned Senior Counsel for the petitioners in Special Criminal Application Nos.895 of 2004 and 928 of 2005 and for the respondents in Cri.Misc.Appln.No.10190 of 2005 as well as learned Public Prosecutor, Mr.A.D.Oza with learned Addl. Public Prosecutor, Mr.R.C.Kodekar, for the respondent-State in Special Criminal Application Nos.895 of 2004 and 928 of 2005 and for the petitioner-State in Cri.Misc.Appln.No.10190 of 2005.

14. Mr.Thakkar mainly submitted that the purpose of constituting the review committee was to see whether charge under POTA is lawfully and

validly applied qua the petitioners or not on an independent examination of the material available on record. According to him, Section 60 pertains to Review Committee is enacted to check and control misuse of application of stringent provisions of law. It was further submitted that valuable human and constitutional right of a person is severely affected under POTA putting stringent conditions on bail. Since no reason for setting aside the findings of the State Review Committee has been given, direction given by the Central Review Committee cannot be enforceable against them and hence, findings of the Central Review Committee can be said to be based on assumptions and presumptions. The petitioners never received money from Abdul Latif Money Exchange and whatever money received was through one Thanmal Jain and hence, it cannot be said that the petitioners

had any knowledge about the money sent by the accused No.1 being used in terrorist activities. According to him, the money sent was never used for terrorist activities. The safeguards provided by the Supreme Court in recording the confessional statements of the accused under Sec.164 of the Code of Criminal Procedure were never followed by the prosecuting agency. Further, the injury received by the petitioner No.3-Mahesh Narsidas Patel prior to recording of the confessional statement ought to have been borne in mind by the Committee. Further, for invoking the provisions of POTA, the Committee relied mainly on the statements of the accused and co-accused. As per Sec.60(7), once direction has been given by the State Review Committee, proceedings against the accused under POTA are deemed to have been withdrawn and thereafter the relevant consideration before the Central Review

Committee would have been to decide whether offence under Sec.22(2) read with Sec.22(5) of POTA can be attracted on the petitioners or not. Once the complainant State has accepted the directions of the State Review Committee, there was no question of reappraisal of the same by the Central Central Review Committee. In view of the aforesaid, it has been requested that the order dated 21-5-2005 passed by the learned Central Review Committee be quashed and set aside and consequently direction be issued to learned POTA Court to withdraw POTA Case against the petitioners.

15. Learned Public Prosecutor, Mr.A.D.Oza, mainly supported the order passed by the learned Special POTA Judge. He took us through the impugned orders and submitted that power of the court is superior than that of the Review Committee. According to him, the decision taken by the State Review Committee was by a

majority opinion and it was accepted by the State Government in toto and purshis to that effect has been filed in the POTA Court and it has been considered by the court along with other aspects. It was further submitted that under POTA repealed Act, Central Review Committee also considered the case of the present petitioners along with other case and gave correct finding holding that prima facie case is made out to proceed against them under POTA. It was therefore submitted that both the State Review Committee as well as the Central Review Committee opined against the petitioners after considering the evidence on record and after giving opportunity to the parties concerned. In these circumstances, the decision taken by the learned Special POTA Court for framing charge against the accused is just, legal and proper and it does not require any interference.

16. In this connection, Mr.Oza took us through the relevant evidence as well as the law on this point. He also placed reliance upon the judgment delivered by a Division Bench of this Court (Coram: G.S.Singhvi & Anand S.Dave,JJ.) in Special Civil Application No.1103 of 2005 with Special Civil application No.1105 of 2005 and submitted that the Division Bench of this Court has dealt with the above referred issue. It has been held in the said judgment by reproducing the counter affidavit filed on behalf of the Union of India by Shri S.C.Sharma, Under Secretary, Ministry of Home Affairs, which, of course was in Special Civil Application Nos.1103 of 2005 with Special Civil Application No.1105 of 2005 as under:

> “In the counter affidavit filed on behalf of the Union of India by Shri S.C. Sharma, Under Secretary, Ministry of Home Affairs, it has been averred that the 2002 Act was repealed with a provision for review of all pending cases keeping in view the widespread misuse of the

2002 Act by the State Governments. It has been further averred that the constitution of the Review Committees does not in any manner encroach upon the judicial power of the State. In paragraph 16 of his affidavit, Shri S.C. Sharma has made the following averments:-

"It is respectfully submitted that the another point that is raised is that the impugned provision seeks to render section 321 of the Criminal Procedure Code nugatory. It is stated that it is the function of the Public Prosecutor to satisfy himself that it is a fit case for withdrawal and for the concerned Court to satisfy that withdrawal is not sought on extraneous considerations and there is no incriminating evidence against the accused persons. This point has no merit as this impugned provision nowhere sets at naught Section 321 of the Criminal Procedure Code which still remains in operation and can be availed of by State Government, if required, and it nowhere encroaches upon independence of judiciary to deal with such application if presented before it by Public Prosecutor. The impugned provision on the contrary provides for more than what is required in Section 321 of Cr.PC in as much as the high powered Review Committee headed by Retired High Court Judge will form an opinion whether there is a prima facie case for proceedings against the accused and this will obviously be done after hearing the parties in view of principles of natural justice."

17. It appears that learned Special Judge (POTA) has dealt with all aspects of the matter including power of the Court under Section 321 of the Code of Criminal Procedure on submission of purshis by the State Government in pursuance of an opinion given by the State Review Committee. On a careful consideration of the evidence and law on this aspect, by a lengthy discussion, it was held that power of the Special POTA Court or the court below under Section 321 Cr.P.C. is independent and can be used independently by the Court irrespective of the opinion given by the POTA Review Committee. It, however, does not appear that the learned Special Judge has dealt with the issue qua formation of State Review Committee under Section 60 of the Act and therefore, said point has been raised by the learned Public Prosecutor for the State before this Court. As far as powers of the Special POTA Court are concerned, we have

taken into consideration the aforesaid judgment delivered by the Division Bench of this Court. The Division Bench, while considering the above aspects of the matter, placed reliance upon the law laid down by the Apex Court while dismissing the petitions for Special Leave to Appeal (Criminal) Nos.868-870 of 2004-Government of Tamil Nadu Vs. Union of India & Ors. decided on 8-3-2004 arising out of W.P. Nos.1238 to 1240 of 2004 and W.P.M.P.Nos.1297 to 1299 of 2004 decided on 4-2-2004, 2004(1) CTC 641. It has been held by the Division Bench as under:

> “The State of Tamil Nadu challenged the judgement of the High Court by filing petitions for Special Leave to Appeal before the Supreme Court. While dismissing the same, their Lordships of the Supreme Court observed as under:
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> "By the amendment, the decision of the Review Committee is made binding on the Central Government, State Governments and the Police Officers Investigating the offence. The High Court has held, in our view correctly, that these amendments are based on the recommendations made by the Constitution Bench of the Court in Kartar

Singh Vs. State of Punjab reported in (1994) 3 SCC and the judgement of this Court in R.M.Tiwari Vs. State (1996) 2 SCC 610. These are the provisions which provide safeguards against of the stringent provisions of such an Act. In our view, the High Court has held correctly that the challenge cannot be sustained. The Court has also correctly held that the directions given by the Review Committee could be subject to Section 321 of the Criminal Code."”

18. It may be stated that the aforesaid judgment of the Division Bench of this Court is under challenge before the Apex Court and is pending its final outcome.

19. It is true that Review Committee constituted under the Act has power to review pending cases as provided under the Act and when the State filed purshis to that effect, then it cannot be said that the opinion given by the State POTA Review Committee as well as Central POTA Review Committee is binding to the Special Court because Special POTA Court has power to deal with the same under Section 321 Cr.P.C. The POTA Court, on receiving of

purshis together with opinion, etc. from the State Government, is bound to deal with the same but cannot straightaway deny the same as the same being an opinion of the Review Committee. However, for accepting or rejecting the same, Court has to apply its mind and justify its act by deciding the matter under Section 321 Cr.P.C. Here, the learned Special POTA Court has decided the issue by holding that there is prima facie against the petitioners for framing of charge.

20. In view of the view taken by the Division Bench of this Court on the basis of law laid down by the Apex Court and also in view of the reasoned order passed by the court dealing with all aspects of the matter including the evidence on record, we also hold that there is prima facie case against the present appellants. Even it has been accepted partly by the State Review Committee

by way of majority decision and fully by the POTA Central Committee Committee. Under the circumstances, we are of the opinion that the order passed by the learned Special Judge (POTA) is just, legal and proper and no interference is called for. Hence, both the petitions are required to be rejected.

21. Thus, Special Criminal Application Nos.895 of 2004 and 928 of 2005 are rejected. Notice is discharged. Interim relief granted earlier vide order dated 10-9-2004 in Special Criminal Application No.895 of 2004 is vacated.

22. In view of the aforesaid dismissal of main Special Criminal Application No.895 of 2004, Cri.Misc.Appln.No.10190 of 2005 does not survive and is disposed of accordingly. Rule is discharged.

23. Since the observations by this Court in this judgment being made for the purpose of deciding these matters, same may not

prejudice the parties in any other proceedings or trial.

24. Office to place a copy of this order in each matter.

(R.P.DHOLAKIA,J.)

(M.D.SHAH, J.)

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Further order

Learned Senior Counsel, Mr.P.M.Thakkar for the petitioners has requested for extension of interim relief granted earlier by the learned Single Judge on the ground that they want to approach the Apex Court and also in view of the fact that as they are in judicial custody till date, no prejudice is likely to be caused to the otherside.

Facts remain that other co-accused are also in judicial custody since long and hence, looking to the facts and circumstances of the case, request is rejected.

(R.P.DHOLAKIA,J.)

(M.D.SHAH, J.)

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